

Chapter 8

Assurances

This chapter provides a discussion of the assurances requested by the Applicants from the USFWS under the “no surprises rule” (50 C.F.R. §§17.22(b)(5), 17.32(b)(5), and 222.307(g)) when the Applicants become Permittees under the LCR MSCP section 10(a)(1)(B) permit. The Applicants and the USFWS will execute an Implementation Agreement that assures the LCR MSCP will be implemented by the Federal and non-Federal parties in accordance with the ESA, the section 10(a)(1)(B) permit, and the section 7 BO. The draft final of the Implementation Agreement is attached to this HCP as Exhibit B. The final form and execution of the Implementation Agreement by each non-Federal party is subject to the approval and authorization of the governing body of that party.

Through the section 10(a)(1)(B) permit and the Implementation Agreement, the USFWS will provide assurances and other commitments to the Permittees. These include the assurance that, provided the Permittees have complied with their obligations under the HCP, the section 10(a)(1)(B) permit, and the Implementation Agreement, the USFWS can require Permittees to provide mitigation only in accordance with applicable Federal law and regulations and the terms of the Implementation Agreement.

On June 10, 2004, the court in *Spirit of the Sage Council v. Norton*, Civil Action No. 98-1873 (D.D.C.) ordered that, until the USFWS completes a rulemaking on revocation standards for incidental take permits, the USFWS may not approve new incidental take permits or related documents containing “no surprises” assurances. The order specifically allows for the USFWS to issue incidental take permits that do not contain “no surprises” assurances. Therefore, the “no surprises” assurances contained in this HCP and the Implementation Agreement are currently unenforceable and ineffective with respect to the LCR MSCP section 10(a)(1)(B) permit. The remainder of the permit, the HCP, and the Implementation Agreement will remain in full force and effect to the maximum extent permitted by law. In addition, in the event that any future judicial decision or determination holds that the “no surprises” assurances rule (or similar successive rule) is vacated, held unenforceable or enjoined for any reason or to any extent, the LCR MSCP section 10(a)(1)(B) permit, the HCP, and the Implementation Agreement shall be enforceable only to the degree allowed by any such decision or determination, provided that the remainder of the section 10(a)(1)(B) permit, the HCP, and the Implementation Agreement shall remain in full force and effect to the maximum extent permitted by law. In the event that the “no surprises” assurances rule is vacated, held unenforceable, or enjoined by a judicial decision or determination, including the June 10, 2004 order described above, but is later reinstated or otherwise authorized, the assurances provided under the reinstated or revised rule shall automatically apply to the LCR MSCP section 10(a)(1)(B) permit, the HCP, and the Implementation Agreement in

1 place of the “no surprises” assurances provisions contained in those documents. If, in
2 response to any judicial decision or determination, the “no surprises” assurances rule is
3 revised, the “no surprises” assurances provisions in the LCR MSCP section 10(a)(1)(B)
4 permit, the HCP, and the Implementation Agreement shall be automatically amended in a
5 manner consistent with the revised rule. Pursuant to the June 10, 2004 order in *Spirit of*
6 *the Sage Council v. Norton*, Civil Action No. 98-1873 (D.D.C.), until the USFWS adopts
7 new revocation rules specifically applicable to incidental take permits, all incidental take
8 permits issued by the USFWS shall be subject to a general revocation standard in 50
9 C.F.R. §13.28(a)(5). Additionally, notwithstanding anything to the contrary in the HCP
10 and Implementation Agreement, the USFWS retains statutory authority, under both
11 sections 7 and 10(a)(1)(B) of the ESA, to revoke incidental take permits that are found
12 likely to jeopardize the continued existence of a listed species.